[Cite as *Main v. Gym X-Treme*, 2012-Ohio-1315.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Brenna H. Main, A Minor et al.,	:	
Plaintiffs-Appellants,	:	
		No. 11AP-643
v.	:	(C.P.C. No. 10CVC-04-5952)
Gym X-Treme et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 27, 2012

Elk & Elk Co., Ltd., *Ryan M. Harrell* and *William C. Price*, for appellants.

Isaac, Brant, Ledman & Teetor, LLP, and *Donald L. Anspaugh*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Plaintiffs-appellants, Brenna H. Main and Danielle J. Main, appeal from the grant of summary judgment in favor of defendant-appellee, Gym X-Treme, by the Franklin County Court of Common Pleas. Because the doctrine of primary assumption of the risk bars appellants' negligence claim as a matter of law, we affirm.

Factual and Procedural History

{¶ 2} On February 17, 2007, ten-year-old Brenna H. Main attended the birthday party of one of her friends at appellee's gymnastic facility. The children attending the party first gathered in a party room adjacent to the main gymnasium. After most of the children had arrived, one of appellee's employees opened the door of the party room to allow the children to enter the main gymnasium. Approximately 12 children, including

Brenna, quickly gathered on the "spring floor" in the gymnasium. Within a few minutes of entering the gymnasium, Brenna jumped on the spring floor, fell, and broke her arm.

{¶ 3} The spring floor is a very large, thickly-padded floor typically used by gymnasts for floor exercises. A spring floor has a plywood base. There are springs underneath the plywood. A spring floor provides a large, thickly-padded surface for floor exercises with a little more lift on jumps.

{¶ 4} Appellants filed a complaint against appellee alleging negligence. Following discovery, appellee filed a motion for summary judgment, which the trial court granted. Appellants appeal, assigning the following error:

> The Trial Court Erred in Granting Summary Judgment in Favor of Appellee[.]

Applicable Legal Standards

{¶ 5} We review the grant of summary judgment by a trial court de novo. *Cabakoff v. Turning Heads Hair Designs, Inc.*, 10th Dist. No. 08AP-644, 2009-Ohio-815, ¶ 3, citing *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.*, 122 Ohio App.3d 100, 103 (12th Dist.1997). We must affirm the trial court's judgment if any of the grounds raised by the movant in the trial court support the judgment. *Cabakoff* at ¶ 3.

{¶ 6} Summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). A party seeking summary judgment "bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record * * * which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996).

{¶ 7} To establish a cause of action for negligence, a plaintiff must show the existence of a duty, breach of the duty, and an injury proximately caused by the breach.

Texler v. D.O. Summers Cleaners & Shirt Laundry Co., 81 Ohio St.3d 677, 680 (1998); *Strother v. Hutchison*, 67 Ohio St.2d 282, 285 (1981).

Doctrine of Primary Assumption of the Risk

{¶ 8} Ohio law recognizes three categories of assumption of the risk as defenses to a negligence claim; express, primary, and implied or secondary. *Schnetz v. Ohio Dept. of Rehab. & Corr.*, 195 Ohio App.3d 207, 2011-Ohio-3927, ¶ 21 (10th Dist.); *Crace v. Kent State Univ.*, 185 Ohio App.3d 534, 2009-Ohio-6898, ¶ 10 (10th Dist.); *Ballinger v. Leaniz Roofing, Ltd.*, 10th Dist. No. 07AP-696, 2008-Ohio-1421, ¶ 6. Here, the trial court granted summary judgment in favor of appellee based upon the doctrine of primary assumption of the risk.

{¶ 9} Under the doctrine of primary assumption of the risk, a plaintiff who voluntarily engages in a recreational activity or sporting event assumes the inherent risks of that activity and cannot recover for injuries sustained in engaging in the activity unless the defendant acted recklessly or intentionally in causing the injures. *Schnetz* at ¶ 23; *Crace* at ¶ 13; *Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379, ¶ 6. The doctrine applies regardless of whether the activity was engaged in by children or adults, or was unorganized, supervised, or unsupervised. *Gentry* at ¶ 8. The rationale behind the doctrine is that certain risks are so intrinsic in some activities that the risk of injury is unavoidable. Moreover, by engaging in the activity, the plaintiff has tacitly consented to these inherent risks. *Schnetz* at ¶ 23. The test for applying the doctrine of primary assumption of the risk to recreational activities and sporting events requires that: (1) the danger is ordinary to the game; (2) it is common knowledge that the danger exists; and (3) the injury occurs as a result of the danger during the course of the game. *Id.*; *Santho v. Boy Scouts of Am.*, 168 Ohio App.3d 27, 2006-Ohio-3656, ¶ 12 (10th Dist.).

{¶ 10}Primary assumption of the risk completely negates a negligence claim because the defendant owes no duty to protect the plaintiff against the inherent risks of the recreational activity in which the plaintiff engages. *Schnetz* at ¶ 24; *Crace* at ¶ 15. Primary assumption of the risk serves to negate the duty of care owed by the defendant to the plaintiff. *Wolfe v. Bison Baseball, Inc.*, 10th Dist. No. 09AP-905, 2010-Ohio-1390, ¶ 18. " 'Because a successful primary assumption of risk defense means that the duty element of negligence is not established as a matter of law, the defense prevents the

plaintiff from even making a prima facie case.' " *Id.* at ¶ 21, quoting *Gallagher v. Cleveland Browns Football Co.*, 74 Ohio St.3d 427, 432 (1996); *Schnetz* at ¶ 24.

{¶ 11}Under the doctrine of primary assumption of the risk, the injured plaintiff's subjective consent to and appreciation for the inherent risks of the recreational activity are immaterial to the analysis. *Schnetz* at ¶ 25; *Crace* at ¶ 16. Those entirely ignorant of the risks of the sport, still assume the risk by participating in the sport. The law simply deems certain risks as accepted by plaintiff regardless of actual knowledge or consent. *Schnetz* at ¶ 25; *Crace* at ¶ 16. Therefore, the doctrine of primary assumption of the risk requires an examination of the activity itself. If the activity involves risks that cannot be eliminated, then a finding of primary assumption of the risk is appropriate. *Gehri v. Capital Racing Club, Inc.*, 10th Dist. No. 96APE10-1307 (June 12, 1997); *Schnetz* at ¶ 25. The defendant's conduct is relevant only if it rises to reckless or intentional conduct. *Gentry* at 143; *Schnetz* at ¶ 23.

{¶ 12}Here, the trial court determined that "play time and gymnastic activities" are recreational activities to which the doctrine of primary assumption of the risk applies. We agree. Playing and/or jumping on a spring floor in a large gymnasium at a birthday party is a recreational activity.

{¶ 13}The trial court also found that tripping, slipping, and falling are all normal inherent risks with these activities. Again, we agree. Loss of balance and falling is an ordinary, inherent risk of jumping on a gymnastic spring floor. It is also a risk that would be appreciated by common knowledge. Whether or not Brenna appreciated this risk is not relevant to the analysis. It is also undisputed that Brenna's injury occurred when she lost her balance and fell while playing and/or jumping on the spring floor. For these reasons, we agree with the trial court that the doctrine of primary assumption of the risk applies.

{¶ 14}Because the doctrine of primary assumption of the risk applies, appellee had no duty to protect Brenna from inherent risks associated with the activity. *Gentry* at 144; *Wolfe* at ¶ 18; *Schnetz* at ¶ 24. Without a duty, there can be no liability for negligence. Nor have appellants ever alleged or argued that appellee's conduct was reckless or intentional.

{¶ 15}Appellants contend that the basis for their claim against appellee is negligent supervision and that negligent supervision is an exception to the doctrine of primary assumption of the risk. Appellants cite *Santho*; *Rodriquez v. O.C.C.H.A.*, 7th Dist. No. 99 C.A.30 (Sept. 26, 2000); and *Kline v. OID Assoc., Inc.*, 80 Ohio App.3d 393 (9th Dist.1992), in support of this contention. We expressly rejected this argument in *Schnetz* and distinguished the cases relied upon by appellants. We noted that *Kline* and *Rodriguez* did not address a claim of negligent supervision in the context of the defense of primary assumption of the risk and that the discussion of this issue in *Santho* was mere dicta. More importantly, in *Schnetz,* we expressly held that negligent supervision is not an exception to the doctrine of primary assumption of the risk. *Schnetz* at ¶ 47.

{¶ 16}Because the undisputed facts demonstrate that the doctrine of primary assumption of the risk bars appellants' negligence claim as a matter of law, we agree with the trial court that appellee is entitled to summary judgment. Therefore, we overrule appellants' sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH, J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶ 17} Because I cannot agree that the doctrine of primary assumption of the risk can apply to a 10-year-old child, I cannot agree with the majority's analysis and respectfully dissent from its result.

{¶ 18} The doctrine of assumption of the risk has traditionally served as an affirmative defense in a negligence case. A plaintiff could not recover for injuries sustained when the plaintiff assumed a known risk. A classic example would be an adult baseball fan who is injured by a foul ball at a baseball game. The doctrine has always taken into consideration the age and sophistication of the injured party.

{¶ 19} Under the trial court's theory, as adopted by the majority of this panel, an infant who is taken to a baseball game and who has his or her skull fractured by a foul ball would have no ability to recover, despite having no knowledge of the risks of baseball.

{¶ 20} In a recent event here in Columbus, a teenager attending a professional hockey game was struck in the head by a hockey puck and killed. Under the majority's theory, her family had no right to recover.

{¶ 21} Ohio, as a state, moved away from using assumption of the risk as a complete defense in favor of having ordinary tort cases decided based upon comparative negligence. The law regarding torts has shifted since assumption of the risk was a complete defense.

{¶ 22} Since the trial court resolved this case solely upon the basis of primary assumption of the risk, I would reverse the trial court's granting of summary judgment and remand the case for a determination of whether Gym X-Treme was negligent under the facts of this case. Since the majority does not do so, I respectfully dissent.